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Putting the Halper Genie Back in the Bottle: Examining United States u. Ursery in Light of Halper, Austin, and Kurth Ranch

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Putting the *Halper* Genie Back in the Bottle: Examining *United States v. Ursery* in Light of *Halper*, *Austin*, and *Kurth Ranch*

I. INTRODUCTION

Over the last few decades, prosecutors have increasingly enjoyed the option of bringing overlapping civil and criminal charges for the same offense.[1] In particular, federal and state governments have pursued civil asset forfeiture in addition to criminal convictions in drug-related offenses.[2] Many defendants

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1. *See* Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 103 (1995). "In [certain states], for example, a drug offender may face fines, imprisonment, civil forfeiture, and a tax for the same [underlying mis]conduct." *Id.* at 103 n.1. The increased availability of multiple sanctions in drug-related cases reflects the legislature's affirmative efforts in waging the war on drugs. *See also* Christian D. Stewart, Note, *Double Jeopardy—State Drug Tax Statutes Go Up In Smoke:* Department of Revenue v. Kurth Ranch, 74 NEB. L. REV. 221, 252 (1995) ("As the regulatory nature of government continues to grow, violators of the criminal law are increasingly facing parallel civil sanctions for the same conduct.").

2. *See* United States v. Ursery, 116 S. Ct. 2135, 2153 (1996) (Stevens, J., concurring in the judgment in part and dissenting in part) (explaining that recently "both Congress and the state legislatures have armed their law enforcement authorities with new powers to forfeit property"); United States v. 92 Buena Vista Ave., 507 U.S. 111, 144 (1993) (Kennedy, J., dissenting) (identifying forfeiture as "the centerpiece of the Nation's drug enforcement laws"); Mary M. Cheh, *Can Something This Easy, Quick, and Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y.L. SCH. L. REV. 1, 1 n.1 (1994) [hereinafter Cheh, *Can Something This Easy*] (stating that "[f]orfeiture is authorized in more than 140 federal statutes" and explaining further that most states have at least one law permitting forfeiture); Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Distinction*, 42 HASTINGS L.J. 1325, 1326 n.4, 1327 (1991) [hereinafter Cheh, *Constitutional Limits*] (commenting on the "explosive growth of stats and federal forfeiture schemes to combat drug offenses" as well as the fact that "the current phenomenon of civil remedies blending with criminal sanctions never has been more actively or consciously pursued"); Jon E. Gordon, Note, *Prosecutors Who Seize Too Much and the Theories They Love: Money Laundering, Facilitation, and Forfeitures*, 44 DUKE L.J. 744, 744 (1995) (indicating that "[s]ince 1970, federal prosecutors have increasingly relied" on forfeiture as an important law enforcement tool); Alison Roberts Solomon, Comment, *Drugs and Money: How Successful Is the Seizure and Forfeiture Program at Raising Revenue and Distributing Proceeds?*, 42 EMORY L.J. 1149, 1149 (1993) (explaining that "[o]ver the last decade, civil and criminal forfeitures have increased enormously, largely in an effort

who have faced both criminal and civil sanctions for their misconduct have challenged the constitutionality of this practice under the Double Jeopardy Clause,[3] which protects against multiple punishments for the same offense.[4] However, there is no "multiple punishment" violation unless a criminal prosecution and a forfeiture proceeding both impose "punishment."[5]

Prior to 1989, the Supreme Court had consistently held that the Double Jeopardy Clause could not be invoked as a bar to civil remedies since such remedies do not impose punishment on the defendant.[6] The Court's position rested on the traditional distinction between civil and criminal law, which "has been a hallmark of English and American jurisprudence for hundreds of years."[7] Historically, certain constitutional protections, including

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to win the ever escalating war on drugs").

3. The Double Jeopardy Clause states that "no person shall . . . for the same offense . . . be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

Verdict finality is at the heart of the Double Jeopardy doctrine. *See* Stewart, *supra* note 1, at 229. "[T]he Double Jeopardy Clause protects against the possibility that the government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding." United States v. Halper, 490 U.S. 435, 451 n.10 (1989).

4. For a brief discussion of the Double Jeopardy Clause's multiple-punishment prohibition, see *Halper*, 490 U.S. at 440. The Double Jeopardy Clause also prohibits a second prosecution for the same offense, whether it occurs after a conviction or an acquittal. *See id. But see Ursery*, 116 S. Ct. at 2152 (Scalia, J., concurring in the judgment); Department of Revenue v. Kurth Ranch, 511 U.S. 767, 798 (1994) (Scalia, J., dissenting). Justice Scalia argues that "the Double Jeopardy Clause prohibits successive prosecution, not successive punishment." *Ursery*, 116 S. Ct. at 2152 (Scalia, J., concurring in the judgment).

5. *See* Anthony G. Hall, *The Effect of Double Jeopardy on Asset Forfeiture*, 32 IDAHO L. REV. 527, 537 (1996). "Punishment" occurs when a sanction furthers the goals of punishment, retribution, and deterrence. The Court explained in *Halper* that it had "recognized in other contexts that punishment serves the twin aims of retribution and deterrence [and that these goals] 'are not legitimate nonpunitive governmental objectives.'" *Halper*, 490 U.S. at 448 (quoting Bell v. Wolfish, 441 U.S. 520, 539 n.20 (1979)).

6. *See* Hall, *supra* note 5, at 537 (explaining that "[p]rior to *Halper* courts had held that sanctions imposed in civil cases never constituted punishment for double jeopardy purposes"); Stephen H. McClain, Note, *Running the Gauntlet: An Assessment of the Double Jeopardy Implications of Criminally Prosecuting Drug Offenders and Pursuing Civil Forfeiture of Related Assets Under 21 U.S.C. § 881(a)(4), (6) and (7)*, 70 NOTRE DAME L. REV. 941, 976 n.187 (1995) (stating that prior to the *Halper* decision, "the Court routinely upheld civil forfeitures as remedial measures which do not punish").

7. Cheh, *Constitutional Limits*, *supra* note 2, at 1325. While criminal proceedings "emphasize adjudication of guilt or innocence" and include "strict adversarial protections for the accused," civil proceedings "emphasize the rights and responsibilities of private parties." *Id.* Civil remedies include restitution, forfeiture, injunction, statutory fines and penalties, loss of government benefits and privileges, civil protection orders, and detention.

those of the Double Jeopardy Clause, were only available to a defendant in criminal proceedings, which alone were understood to inflict punishment.[8] Yet, over the past eight years, the Supreme Court has begun to extend these constitutional protections to defendants in civil proceedings. In 1989, the Court decided *United States v. Halper*,[9] holding for the first time that a disproportionately large civil sanction constitutes punishment for double jeopardy purposes.[10]

Although *Halper* opened the door to double jeopardy defenses in civil proceedings, the Court's opinion left a great deal of uncertainty as to how far the door had been opened.[11] Over the past few years, there has been a great deal of legal scholarship in response to the uncertainty raised by *Halper*. The Court's subsequent decisions in *Austin v. United States*[12] and *Department of Revenue v. Kurth Ranch*[13] have only added to the uncertainty. Many practitioners, legal scholars, and members of the judiciary have interpreted these cases as opening the door wide enough to effect a significant collapsing of the basic division between civil and criminal law "across a broad front."[14] Given such broad in-

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8. Civil proceedings were understood to serve strictly remedial ends. They are "primarily aimed at facilitating regulation and compensation." *Id.* at 1350. Cheh writes that "recompense of the injured" is "the hallmark of a civil proceeding." *Id.* at 1354.

9. 490 U.S. 435 (1989).

10. *See* David J. Stone, Note, *The Opportunity of* Austin v. United States*: Toward a Functional Approach to Civil Forfeiture and the Eighth Amendment*, 73 B.U. L. REV. 427, 438 (1993) (explaining that through the Supreme Court's unanimous decision in *Halper*, holding that "an ostensibly 'non-criminal' punishment must [at times] be treated as criminal for constitutional purposes," the Court dealt its "strongest blow to the civil/criminal dichotomy").

11. *See* Cheh, *Can Something This Easy*, *supra* note 2, at 21 (explaining that the lower courts "are divided over how precisely to apply the [Double Jeopardy] defense" and recognizing the "growing need to harmonize the welter of double jeopardy rulings involving forfeiture . . . all spawned by the Supreme Court's conclusion in *United States v. Halper*—that double jeopardy applies to civil and criminal proceedings"); McClain, *supra* note 6, at 944 (explaining that since the recent Supreme Court decisions in the area of double jeopardy, "the Courts of Appeals have inconsistently interpreted the . . . Double Jeopardy Clause"). As Justice Rehnquist noted prior to *Halper*, the Double Jeopardy Clause is "one of the least understood . . . provisions of the Bill of Rights" and "[the] Court has done little to alleviate the confusion." Whalen v. United States, 445 U.S. 684, 699 (1980) (Rehnquist, J., dissenting).

12. 509 U.S. 602 (1993).

13. 511 U.S. 767 (1994).

14. Cheh, *Constitutional Limits*, *supra* note 2, at 1325; *see also id.* at 1328 (discussing the ramifications of the current practice of "melding . . . civil remedies and criminal penalties"); Robin M. Sackett, Comment, *The Impact of* Austin v. United States*: Extending Constitutional Protections to Claimants in Civil Forfeiture Proceedings*, 24 GOLDEN GATE U. L. REV. 495, 515-16 (1994) (explaining that as a practical matter, "the distinction between civil and criminal law is often blurred" to the

terpretations on the part of the legal community, the Supreme Court's recent decision in *United States v. Ursery*[15] is surprising. *Ursery* effectively slams the door on defendants' use of the Double Jeopardy Clause in the civil forfeiture context. This Note explores the impact of *Ursery*.

Part II of this Note develops the background of the *Ursery* decision by explaining the controversy surrounding modern civil forfeiture and by discussing the cases that supported a movement toward extending double jeopardy protection in civil forfeiture proceedings. Part III outlines the facts of *Ursery* and the Court's reasoning for its holding that civil *in rem* forfeitures are neither "punishment" nor criminal for double jeopardy purposes. Part IV.A discusses the series of inconsistencies that exist between *Ursery* and the Court's earlier decisions in *Halper*, *Austin*, and *Kurth Ranch*. Part IV.B evaluates the current status of the "guilty property" fiction,[16] upon which the decision in *Ursery* rests, and considers its legitimacy as a justification for modern forfeiture statutes. Finally, Part IV.C raises some of the concerns about modern forfeiture that *Ursery* failed to address. This Note concludes that *Ursery* was decided incorrectly in light of both the double jeopardy jurisprudence developed since 1989 and

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point that "there exists an expanding gray area in which civil and criminal law overlap" and explaining further that the Supreme Court's "*Austin* decision widened the gray area between civil and criminal law as it pertains to forfeiture, perhaps to the point of irreconcilability"); Stewart, *supra* note 1, at 234 (stating that "[t]he import of the civil-criminal distinction changed drastically [after] the Supreme Court's decision in *Halper*"); Stone, *supra* note 10, at 434 (noting that "[s]ome judges . . . have classified certain forfeitures as 'quasi-criminal'"); *id.* at 437 (indicating that "[a]s recently as 1976, the Supreme Court suggested a breakdown of the strict civil/criminal dichotomy").

15. 116 S. Ct. 2135 (1996).

16. Forfeiture has a very long history in the common law:

> At common law the value of an inanimate object directly or indirectly causing the accidental death of a King's subject was forfeited to the Crown as a deodand. The origins of the deodand are traceable to Biblical and pre-Judeo-Christian practices, which reflected the view that the instrument of death was accused and that religious expiation was required.

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-81 (1974) (footnotes omitted). Out of this thinking developed the legal fiction that the property itself was guilty of wrongdoing and must be punished. English law also provided by statute for the forfeiture of "offending objects used in violation of the customs and revenue laws." *Id.* at 682. These statutory forfeitures "took hold in the United States." Austin v. United States, 509 U.S. 602, 613 (1993). The First Congress established laws allowing the seizure and forfeiture of ships and cargos involved in customs offenses. *See id.* In these forfeiture proceedings as well, the focus was on the "guilty" property itself, allowing the courts to exercise *in rem* jurisdiction to effectuate the forfeiture.

the need to extend additional constitutional protection to defendants in civil forfeiture proceedings.

II. BACKGROUND

A. *Understanding Modern Civil Forfeiture*

Until 1970, the use of forfeiture in the United States was limited.[17] Since then, both criminal and civil forfeiture have increasingly become one of the most powerful weapons against the illegal drug trade.[18] Civil forfeiture provides a number of procedural advantages for prosecutors that criminal forfeiture does not. For instance, a conviction is not a prerequisite in a civil-forfeiture proceeding. In fact, the government can typically seize an asset on the basis of probable cause without notice to the owner.[19] Furthermore, most of the protections given to defendants in criminal proceedings do not apply in civil proceedings.[20] Civil forfeitures are consequently "easier to use, more efficient, and less costly" than criminal proceedings.[21] However, given the few constitutional protections afforded defendants in civil proceedings and the extremely broad scope of the civil forfeiture statutes today, the potential for abuse causes concern.

There is no question that modern forfeiture statutes have become increasingly broad in their scope. Prior to 1978, the only assets that could be seized pursuant to federal statutes were illegal substances themselves, plus any property, real or personal, that was used or intended for use in the consumption, processing, transportation, and distribution of those substances.[22] In 1978, the scope of civil forfeiture was expanded significantly by adding to the list all property used to "facilitate" the drug trade. In 1984, Congress expanded civil forfeiture further by permitting forfeiture of "[a]ll real property . . . in the whole or any lot or tract of land . . . which is used, or intended to be used . . . to commit, or to facilitate the commission of, a [controlled substance] violation."[23] As a result of these expansions, the government may

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17. *See* Gordon, *supra* note 2, at 746.

18. Between the years of 1985 and 1991, the number of forfeitures grew at an average annual rate of 99%. *See* McClain, *supra* note 6, at 941 n.2.

19. *See* Solomon, *supra* note 2, at 1153.

20. *See* Gordon, *supra* note 2, at 748 n.36.

21. Stewart, *supra* note 1, at 253.

22. *See* Gordon, *supra* note 2, at 750.

23. Sandra Guerra, *Family Values?: The Family as an Innocent Victim of Civil Drug Asset Forfeiture*, 81 CORNELL L. REV. 343, 361 (1996) (citing Comprehensive Drug

now seize "any type of property even minimally connected to drug activity."[24] As Justice Stevens has explained, the "new powers to forfeit property" with which "both Congress and state legislatures have armed their law enforcement authorities" now "vastly exceed their traditional tools."[25]

There are three kinds of forfeitable property: contraband; proceeds; and instrumentalities, also called facilitating property.[26] The forfeiture of contraband (property that is either illegal to possess or else a harm in and of itself[27]) and the forfeiture of proceeds (the profits of crime) are both largely uncontroversial.[28] In the case of contraband forfeiture, as long as the ban on possession of a particular item does not restrict freedom of religion (e.g., banning crucifixes) or freedom of expression (e.g., banning flags), there is nothing controversial about seizing property that is illegal to possess in order to protect public health and morals.[29] In the case of proceeds forfeiture, while there may be concerns regarding how to calculate the proceeds of a crime, the compelling public policy argument is nonetheless that criminals should not profit from their crimes.[30] However, for several reasons, a significant amount of controversy surrounds the forfeiture of instrumentalities[31] ("properties that are used, or intended for use, to commit or facilitate a crime"[32]).

Abuse Prevention & Control Act of 1970 § 306, 21 U.S.C. § 881(a)(7) (1994)).

24. *Id.* at 360.

25. United States v. Ursery, 116 S. Ct. 2135, 2153 (1996) (Stevens, J., concurring in the judgment in part and dissenting in part).

26. *See* Cheh, *Can Something This Easy*, *supra* note 2, at 14. Cheh notes that the government can simultaneously pursue more than one form of asset. *See id.*

27. Examples of contraband include "stolen property, illicit drugs, outlawed guns, or misbranded products." *Id.* Cheh notes that the "Supreme Court has defined contraband as 'objects the possession of which, without more, constitutes a crime.'" *Id.* at 14 n.70 (quoting 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965)).

28. *See id.* at 14-15; *see also* Stacy J. Pollock, Note, *Proportionality in Civil Forfeitures: Toward a Remedial Solution*, 62 GEO. WASH. L. REV. 456, 478 (1994) (explaining that "*all* assets that represent contraband or crime proceeds validly are forfeitable").

29. *See* Cheh, *Can Something This Easy*, *supra* note 2, at 14-15; *see also* Pollock, *supra* note 28, at 478 (explaining that the confiscation of contraband could never be excessive because it merely "rids society of objects that present dangers to the community").

30. *See* Pollock, *supra* note 28, at 478 ("[T]he government is justified in confiscating all crime proceeds because no proceeds would have been realized if the crime had not been committed.").

31. *See* Cheh, *Can Something This Easy*, *supra* note 2, at 16.

32. *Id.* at 14.

First, the justification for this form of forfeiture has historically depended upon the guilty-property fiction which in and of itself generates a great deal of controversy.[33] Forfeiture is a severe remedy since it constitutes a physical appropriation by the government of property, extinguishing all the owner's interests in the item. Basing the forfeiture of facilitating property on the fiction that the property is guilty and that "therefore the owner has no interest in its disposition,"[34] the government may confiscate property without giving notice to the owner. Furthermore, the owner then has the burden of proving the property's innocence while paying the costs involved in doing so.[35] Thus, the very aspects that "make civil forfeiture attractive to prosecutors make it devastating to property owners."[36]

Second, the forfeiture of instrumentalities is controversial because it may serve punitive ends. Professor Mary Cheh has argued that a seizure, to be remedial, must confiscate property that is a harm in and of itself.[37] In the case of facilitating property, in contrast, any legitimate item of property may be confiscated if it has had some connection, however remote, to illegal activity. For example, the Seventh Circuit affirmed the forfeiture of a 1990 Toyota 4Runner simply because it was the "mode of conveyance" to and from a meeting where plans to import heroin were discussed.[38] The 4Runner did not cause any harm in and of itself, and as the Supreme Court has remarked, "[t]here is nothing even remotely criminal in possessing an automobile."[39] In

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33. *See infra* Part IV.B.

34. Guerra, *supra* note 23, at 362.

35. *See* Cheh, *Can Something This Easy*, *supra* note 2, at 2; *see also* Richard Miniter, *Ill-Gotten Gains: Abuse of Asset Forfeiture Statutes*, REASON, Aug.-Sept. 1993, at 32, 35, *available in* LEXIS, News Library, Mags File (explaining that police can keep the cash they have forfeited "until the owner mounts a costly, time-consuming lawsuit to get it back" and that most owners therefore "just give up—and the funds go into police coffers").

36. Guerra, *supra* note 23, at 363.

37. *See* Cheh, *Can Something This Easy*, *supra* note 2, at 2.

38. *See* United States v. 1990 Toyota 4Runner, 9 F.3d 651 (7th Cir. 1993). The court reasoned as follows:

> In order to import the heroin into the United States and place it in Oloko's [the conspirator's] possession, someone had to go to Manila, get it, and bring it back. In order for someone to go to Manila for this purpose, arrangements for the trip had to be made . . . . In order to make these arrangements, the conspirators had to meet, and Oloko's presence at the meeting was "facilitsted" by the Toyota, his mode of conveyance to and from the meeting.

Id. at 652.

39. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965); *see* Guerra, *supra* note 23, at 391 (explaining that the Supreme Court has observed that

that case, the seizure did not serve remedial ends, but served rather to punish the conspirator.[40]

Third, instrumentality forfeiture is controversial because law enforcement agencies may generally sell what they seize and keep the profits.[41] So, "[t]he more they confiscate, the more they get."[42] The government can also choose to retain forfeited property for official use.[43] Indeed, the Department of Justice included, as one of the three goals of its asset forfeiture program, "'produc[ing] revenues to enhance forfeitures and strengthen law enforcement.'"[44] Since those conducting the forfeitures benefit directly from the assets forfeited, there is great potential for misuse of the forfeiture power.

Fourth, the forfeiture of facilitating property is controversial because the value of the confiscated property is often manifestly disproportionate to the underlying crime.[45] For example, whole

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"forfeitures of real property serve primarily to punish, not to divest a person of ill-gotten gains").

40. *See* Cheh, *Can Something This Easy*, *supra* note 2, at 16 (arguing that the "principal aim of instrumentality forfeiture, whether admitted or not, is punishment and deterrence").

41. *See id.* at 3.

42. *Id.* at 4. "Law-enforcement officials have a vested interest in maintaining and expanding asset forfeiture. It's a way to feed their budgets without tax increases. . . . Many law-enforcement agencies have become dependent on the money." Miniter, *supra* note 35, at 33.

43. In 1993, the federal government kept $12.8 million worth of conveyances and property for its official use. It also transferred $10.2 million to state and local law enforcement agencies that year. *See* Cheh, *Can Something This Easy*, *supra* note 2, at 4 n.15. Cheh writes that "[t]he seizure of expensive homes, luxury cars, planes, and other assets has also tempted some law enforcement agencies to put property to use in corrupt or questionable ways." *Id.* at 43; *see also* Solomon, *supra* note 2, at 1170 (pointing to official use of forfeited items as an area of "government misuse and abuse").

44. Solomon, *supra* note 2, at 1159 (quoting U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES ON SEIZED AND FORFEITED PROPERTY 1 (1990)). Congress similarly intended that "'the asset forfeiture program . . . help pay a portion of the costs of the war on drugs with funds seized from drug traffickers.'" *Id.* at 1159 (quoting H.R. REP. NO. 102-1086, pt. 2, at 43 (1992)).

45. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (affirming the forfeiture of a yacht elthough only one marijuana cigarette was found on board); United States v. 566 Hendrickson Blvd., 986 F.2d 990, 997 (6th Cir. 1993) (affirming a forfeiture of a $65,000 home for possession of two marijuana plants); United States v. 3639-2nd St., 869 F.2d 1093, 1096 (8th Cir. 1989) (holding that the amount of cocaine sold was irrelevant in the forfeiture of a home); United States v. One 1986 Mercedes Benz, 846 F.2d 2, 4-5 (2d Cir. 1988) (basing forfeiture of an automobile on one marijuana cigaretto butt found in its ashtray); United States v. One 1974 Cadillac Eldorado Sedan, 548 F.2d 421, 425 (2d Cir. 1987) (stating that "[t]he transportation of any quantity of drugs however minute is admittedly sufficient to merit the forfeiture of [a] vehicle"); United States v. One 1982 28' Int'l Vessel, 741 F.2d

tracts of land have been forfeited although the criminal activity may only have been committed on a small, severable portion of the land.[46] From an economic standpoint, it has been argued that disproportionate forfeiture is an "inefficient reallocation of resources because [a] home [is] almost certainly more valued by the [owners] than by the government."[47] Thus, forfeiture tends to shift resources "to a less valued use" while creating "avoidable transaction costs in the form of the property owner's appeals and the government's resale costs."[48] Beyond the economic implications, however, there is also the concern that a forfeiture of facilitating property may visit an excessive amount of punishment on the individual.

B. *The Court's Early Civil Forfeiture Decisions:* Various Items, Emerald Cut Stones, *and* 89 Firearms

One of the Supreme Court's earliest cases considering the relationship between the Double Jeopardy Clause and civil forfeiture was *Various Items of Personal Property v. United States*.[49] In that case, the government had initiated a forfeiture action against a distilling corporation.[50] Because the forfeiture followed

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1319, 1322 (11th Cir. 1984) (allowing the forfeiture of a 28-foot boat on the ground that one marijuana twig and two marijuana leaves were discovered on the floor of the boat); United States v. Certain Funds on Deposit in Account No. 01-0-71417, 769 F. Supp. 80, 84 (E.D.N.Y. 1991) (holding the entire balance of an account subject to forfeiture even if only some of the money facilitated money laundering); *see also* Catherine Cerna, *Economic Theory Applied to Civil Forfeiture: Efficiency and Deterrence Through Reallocation of External Costs*, 46 HASTINGS L.J. 1939, 1940 (1995) (arguing the disproportionality, for example, of the 1991 forfeiture of a home where police discovered 354 marijuana plants, grown for the owner's private use and having a market value of only $137.50); Sackett, *supra* note 14, at 495-96 (relating that parents of three children had their 27-year-old mobile home seized, "threatening the family with homelessness," because they had been growing four marijuana plants behind the mobile home).

46. *See* United States v. 3097 S.W. 111th Ave., 921 F.2d 1551, 1557 (11th Cir. 1991) (allowing the forfeiture of a $250,000 house and the land on which it was located because of a single drug transaction which took place in a car parked in the driveway of the house); United States v. 141st St. Corp., 911 F.2d 870, 872-73 (2d Cir. 1990) (upholding the forfeiture of a 41-unit apartment although only 15 units were actually used to further criminal activity); *see also supra* note 23 and accompanying text.

47. Cerna, *supra* note 45, at 1942.

48. *Id.*

49. 282 U.S. 577 (1931).

50. The forfeiture was sought "on the ground that the corporation had conducted its distilling business upon the premises with intent to defraud, and had defrauded, the government of the tax on the spirits distilled." *Id.* at 578.

a criminal conviction, the corporation argued that forfeiture of its equipment would violate the Double Jeopardy Clause.

The Court unanimously held that the Double Jeopardy Clause was inapplicable to civil forfeiture, resting its analysis on the premise that the corporation was not being punished twice. Rather, it was the property, and not the corporation, that was proceeded against and punished in the forfeiture action:

> [This] forfeiture proceeding . . . is *in rem*. It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient. In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted and punished. The forfeiture is no part of the punishment for the criminal offense.[51]

Forty years after *Various Items*, the Court next considered double jeopardy in the context of civil forfeiture in *One Lot Emerald Cut Stones v. United States*.[52] The defendant in *Emerald Cut Stones* had been acquitted on charges of smuggling jewels. Following the acquittal, the government instituted a civil forfeiture proceeding against the jewels.[53] The Supreme Court rejected the defendant's double jeopardy challenge to the forfeiture, explaining that "[i]f for no other reason, the forfeiture is not barred by the Double Jeopardy Clause . . . because it involves neither two criminal trials nor two criminal punishments."[54] The Court further explained that "[t]he question of whether a given action is civil or criminal is one of statutory construction."[55] In essence, because the forfeiture involved was a civil proceeding, it did not constitute a second punishment for double jeopardy purposes.

In 1984, the Court decided *United States v. One Assortment of 89 Firearms*,[56] holding again that a civil forfeiture was not barred on double jeopardy grounds by a prior criminal proceeding. The Court stated that "[u]nless the forfeiture sanction was intended as punishment, so that the proceeding is essentially

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51. *Id.* at 581.

52. 409 U.S. 232 (1972).

53. *See id.* The jewels, consisting of one lot of emerald cut stones and one ring, were argued to be subject to forfeiture pursuant to 19 U.S.C. § 1497. *See id.* at 233.

54. *Id.* at 235. The Court explained that "[f]orfeiture under § 1497 [was] a civil sanction," *id.* at 236, and that "'Congress may impose both a criminal and a civil sanction in respect to the same act or omission,'" *id.* at 235 (quoting Helvering v. Mitchell, 303 U.S. 391, 399 (1938)).

55. *Id.* at 237.

56. 465 U.S. 354 (1984).

criminal in character, the Double Jeopardy Clause is not applicable."[57] Thus, the relevant question was if "[the] forfeiture proceeding [was] intended to be, or by its nature necessarily [was], criminal and punitive, or civil and remedial."[58]

The Court proceeded to answer the question by first looking at the intent of Congress and then looking at "'whether the statutory scheme was so punitive either in purpose or effect as to negate' Congress' intention to establish a civil remedial mechanism."[59] The Court ultimately concluded that the civil forfeiture was "not an additional penalty for the commission of a criminal act, but rather [was] a separate civil sanction, remedial in nature."[60]

These earlier cases "set the stage" for the "trio of recent decisions" discussed below which developed the modern perception of how the Double Jeopardy Clause applies in civil actions.[61]

C. *The Court's Decisions in* Halper, Austin, *and* Kurth Ranch

In 1989, the Supreme Court decided *United States v. Halper*.[62] Halper, the manager of a company providing medical services under the federal Medicare program, was convicted of submitting sixty-five false claims for government reimbursement.[63] Following the conviction, the government brought a civil action against Halper pursuant to the False Claims Act, under which he was potentially subject to a civil penalty of more than $130,000.[64]

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57. *Id.* at 362.

58. *Id.*

59. *Id.* at 365 (quoting United States v. Ward, 448 U.S. 242, 248-49 (1980)). The Court further quoted the *Ward* decision:

> "Our inquiry in this regard has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention."

Id. at 362-63 (quoting *Ward*, 448 U.S. at 248) (citations omitted).

60. *Id.* at 366.

61. *See* United States v. Ursery, 116 S. Ct. 2135, 2155-56 (1996) (Stevens, J., concurring in the judgment in part and dissenting in part).

62. 490 U.S. 435 (1989).

63. Halper was sentenced to imprisonment for two years and was also fined $5000. *See id.* at 437.

64. The False Claims Act provided that anyone in violation would be "liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and

The Supreme Court reviewed *Halper* to determine whether, in light of Halper's previous criminal conviction, the civil penalty did in fact "constitute[] a second 'punishment' for the purpose of double jeopardy analysis."[65] The Court expressed concern that Halper's penalty under the False Claims Act, if imposed, would be 220 times greater than the damages actually suffered by the government.[66] The Court ultimately concluded that Halper's $130,000 liability was sufficiently disproportionate to the government's actual loss "that the sanction constitute[d] a second punishment in violation of double jeopardy."[67]

In arriving at this holding, the Court rejected the government's argument that punishment was only "meted out" in criminal proceedings[68] and that whether a particular proceeding was criminal or civil was strictly a matter of statutory construction.[69] The Court explained:

> [W]hile recourse to statutory language, structure, and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter, [such an] approach is not well suited to the context of the "humane interests" safeguarded by the Double Jeopardy Clause's proscription of multiple punishments.[70]

Consequently, the Court concluded that "the labels 'criminal' and 'civil' are not of paramount importance" for double jeopardy analysis.[71]

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costs of the civil action.'" *Id.* at 438 (quoting 31 U.S.C. § 3729 (Supp. II 1982)). However, because he had violated the Act 65 times, Halper was subject to a penalty of $130,000 under the Act.

65. *Id.* at 441.

66. The District Court calculated the government's actual damages as a result of Halper's fraud to be only $585. *See id.* at 439.

67. *Id.* at 452. In so doing, the *Halper* Court set out a sort of balancing test whereby a court must balance the amount of the penalty imposed against the harm suffered by the government.

68. The Court held that "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction [could] not fairly be characterized as remedial, but only as a daterrent or retribution," which the Court determined were the twin aims of punishment. *Id.* at 448-49.

69. *See id.* at 447.

70. *Id.* The *Halper* Court explained that its earlier cases had never established an "absolute and irrebuttable rule that a civil fine [could not] be 'punishment' under the Double Jeopardy Clause." United States v. Ursery, 116 S. Ct. 2135, 2143 (1996) (characterizing the *Halper* Court's analysis).

71. *Halper*, 490 U.S. at 447.

The Court's decision four years later in *Austin v. United States*[72] did not directly involve the Double Jeopardy Clause, yet the case was significant because it reinforced the notion introduced in *Halper* that certain civil sanctions could actually constitute punishment. Austin had been convicted of possessing cocaine with intent to distribute and was sentenced to seven years' imprisonment.[73] In addition, the government had filed a civil forfeiture proceeding against Austin's mobile home and auto body shop which, it asserted, were instrumentalities of his crime and therefore forfeitable under 21 U.S.C. §§ 881(a)(4) and (a)(7).[74] Austin argued that the forfeiture of his property violated the Excessive Fines Clause of the Eighth Amendment.[75]

The Supreme Court held that in order for the forfeiture of Austin's property to become subject to the limitations of the Excessive Fines Clause, the forfeiture must be found to constitute punishment. The Court accordingly conducted a historical review of forfeiture,[76] relying on *Halper* for the proposition that any civil sanction that did not solely serve a remedial purpose was in fact punishment.[77] The Court found that "forfeiture generally and statutory *in rem* forfeiture in particular" were understood historically to punish the individual.[78] It held that forfeiture was subject to the Excessive Fines Clause since it "constitute[d] 'payment to a sovereign as punishment for some offense.'"[79]

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72. 509 U.S. 602 (1993).

73. *See id.* at 604.

74. These statutes provide for the forfeiture of:

> (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [controlled substances, their raw materials, and equipment used in their manufacture and distribution.]
>
> . . . .
>
> (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment . . . .

21 U.S.C. §§ 881(a)(4), (a)(7) (1994).

75. *See Austin*, 509 U.S. at 605. The Excessive Fines Clause provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

76. For the Court's discussion of the historical development of forfeiture, see *Austin*, 509 U.S. at 611-14.

77. *See id.* at 610.

78. *Id.* at 618.

79. *Id.* at 622 (quoting Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S.

Because *Austin* involved the Excessive Fines Clause, the decision did not speak directly to the question of whether imposition of a civil forfeiture might potentially violate the Double Jeopardy Clause. However, legal scholars interpreting *Austin* read it to mean that civil forfeitures, as "punishment," would also be subject to the limitations of the Double Jeopardy Clause.[80]

The Court's decision in *Department of Revenue v. Kurth Ranch* was the third case in the line of cases establishing "an increasingly broad interpretation" of the Double Jeopardy Clause.[81] *Kurth Ranch* involved Montana's Dangerous Drug Tax Act which imposed a tax "'on the possession and storage of dangerous drugs.'"[82] In 1987, the Kurth family farm was raided by Montana law enforcement officers, putting an end to the family's marijuana business and giving rise to four separate legal proceedings: a criminal proceeding, a civil forfeiture action, a civil drug tax assessment, and a bankruptcy proceeding.[83] In the bankruptcy proceeding, the Kurths challenged the constitutionality of the Montana tax. The bankruptcy court relied primarily on *Halper* to decide that the tax assessment violated the Double Jeopardy Clause.[84]

The Supreme Court granted certiorari to determine "whether the tax [had] punitive characteristics that [would] subject it to the constraints of the Double Jeopardy Clause."[85] The Court determined that because the tax was conditioned on the commission of a crime and was levied on goods after they had already been forfeited, it amounted to "a concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to

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257, 265 (1989)).

80. *See, e.g.*, Cheh, *Can Something This Easy, supra* note 2, at 14 (stating that "[t]he Court clearly signalled [in *Austin*] that, where forfeitures operate as punishment, the Double Jeopardy Clause will apply").

81. *See* Eric Michael Anielak, Note, *Double Jeopardy: Protection Against Multiple Punishments*, 61 MO. L. REV. 169, 169 (1996).

82. Department of Revenue v. Kurth Ranch, 511 U.S. 767, 770 (1994) (quoting MONT. CODE ANN. § 15-25-111 (1987)). The tax amounted to either 10% of the market value of the drugs or a designated amount depending on the particular drug involved, whichever was greater. *See id.*

83. *See id.* at 771.

84. *See id.* at 773. The State argued that the tax was not a penalty since it was designed to recover law enforcement costs, which serves a remedial purpose. The bankruptcy court rejected this argument, however, concluding that the purpose of the drug tax statute was in fact "deterrence and punishment." *Id.*

85. *Id.* at 778-79.

escape characterization as punishment for the purposes of Double Jeopardy analysis."[86]

The Court's decisions in *Halper*, *Austin*, and *Kurth Ranch* seemed to expand the scope of the Double Jeopardy Clause. Although the Court's early decisions in *Various Items*, *Emerald Cut Stones*, and *89 Firearms* had consistently held that a civil forfeiture did not constitute a second punishment under the Double Jeopardy Clause, at least the Ninth Circuit read the Court's recent decisions in *Halper*, *Austin*, and *Kurth Ranch* to have "changed [the Court's] collective mind."[87]

III. *UNITED STATES V. URSERY*

A. Facts

In *United States v. Ursery*,[88] the Supreme Court consolidated two separate cases coming out of the Sixth and Ninth Circuits: *United States v. Ursery*[89] and *United States v. $405,089.23 U.S. Currency*.[90] Both cases involved drug-related offenses and presented the question of whether imposition of a criminal conviction and a civil forfeiture constituted multiple punishments for the same offense.

In *Ursery*, state police discovered that Guy Ursery was growing marijuana on his Michigan property.[91] They also discovered marijuana plants and a growlight in his house.[92] The government began civil forfeiture proceedings under 21 U.S.C. § 881(a)(7) against Ursery's house on the theory that the house had facilitated the illegal processing and distribution of a controlled substance.[93] In the end, Ursery settled the forfeiture claim by paying the government $13,250. However, before the settlement was

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86. *Id.* at 783.

87. United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1218 (9th Cir. 1994), *rev'd sub nom.* United States v. Ursery, 116 S. Ct. 2135 (1996). The Ninth Circuit explained that "[a] decade ago, the law was clear that civil forfeitures did not constitute 'punishment' for double jeopardy purposes," but, "as sometimes happens, the Court changed its collective mind" and "adopted a new test for determining whether a nominally civil sanction constitutes 'punishment' for double jeopardy purposes." *Id.* at 1218-19.

88. 116 S. Ct. 2135 (1996).

89. 59 F.3d 568 (6th Cir. 1995), *rev'd*, 116 S. Ct. 2135 (1996).

90. 33 F.3d 1210 (9th Cir. 1994), *rev'd sub nom.* United States v. Ursery, 116 S. Ct. 2135 (1996).

91. The police seized 142 marijuana plants which were growing in six plots to the west of Ursery's rural home. *See Ursery*, 59 F.3d at 570.

92. *See Ursery*, 116 S. Ct. at 2138.

93. *See id.* at 2139; *see also* statute excerpted *supra* note 74.

concluded, Ursery was indicted for the manufacturing of marijuana pursuant to § 841(a)(1).[94] He was found guilty and sentenced to sixty-three months in prison.

In *United States v. $405,089.23 U.S. Currency*, Charles Wesley Arlt and James Wren were sentenced to life in prison following a conviction for conspiracy to promote the manufacture of methamphetamine and to launder monetary instruments.[95] Before the criminal trial had begun, however, the government initiated civil *in rem* forfeiture proceedings against property seized from Arlt and Wren, as well as Payback Mines, a corporation controlled by Arlt.[96] Disposition of the forfeiture action was deferred until after the criminal trial, but the District Court ultimately granted the United States' motion for summary judgment in the civil forfeiture proceeding.

Both the Sixth and the Ninth Circuit courts held that "any civil forfeiture under § 881(a)(7) constitutes punishment for purposes of the Double Jeopardy Clause."[97] Both courts based their decisions on *Halper*, *Austin*, and *Kurth Ranch*.[98] The Supreme Court granted certiorari.

B. The Ursery *Court's Reasoning*

The Supreme Court reversed the Sixth and Ninth Circuits' decisions, explaining that both courts had "misread *Halper*, *Austin*, and *Kurth Ranch*"[99] since "nothing in [those cases] purported to replace [the] traditional understanding that civil forfeiture does not constitute punishment for the purpose of the Double Jeopardy Clause."[100]

The Court reviewed a "long line of cases" involving the Double Jeopardy Clause throughout which it had "consistently conclud[ed] that the Clause does not apply to [civil forfeitures] because they do not impose punishment."[101] Having emphasized its consistency on the issue, the Court next explained why

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94. Section 841(a)(1) reads: "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1) (1994).

95. *See Ursery*, 116 S. Ct. at 2139.

96. *See id.*

97. *Id.*

98. *See id.*

99. *Id.* at 2144.

100. *Id.* at 2147.

101. *Id.* at 2140.

Halper, *Austin*, and *Kurth Ranch* did not "accomplish[] the radical jurisprudential shift perceived by the Courts of Appeals."[102]

According to the Court, the *Halper* decision "was limited to the context of civil penalties" and was meant to have a "narrow focus."[103] The Court further explained *Halper*'s inapplicability to civil forfeiture by focusing on the historical distinction between a civil penalty which punishes "'the wrongdoer in person . . .' [and] an *in rem* forfeiture proceeding [where] 'it is the property which is proceeded against, and by resort to a legal fiction, held guilty and condemned.'"[104] Finally, the Court explained that because forfeiture "serves a variety of [nonpunitive] purposes," which are "virtually impossible to quantify," the balancing test set out in *Halper*[105] for determining the disproportionality of the penalty imposed is simply "inapplicable to civil forfeiture."[106]

Next, the Court stated that *Austin* and *Kurth Ranch* in no way extended the principles enunciated in *Halper*.[107] The Court explained that "[t]he holding of *Austin* was limited to the Excessive Fines Clause of the Eighth Amendment"[108] and that the *Kurth Ranch* opinion had "expressly disclaimed reliance upon *Halper*."[109] In sum, the Court explained that *Halper*, *Austin*, and *Kurth Ranch* could not influence *Ursery* since "[n]one of those cases dealt with the subject of [*Ursery*]: *in rem* civil forfeitures for purposes of the Double Jeopardy Clause."[110]

Consequently, the Court referred to the two-part test set out in *89 Firearms*: (1) whether Congress indicated a preference for creating a civil sanction; and (2) "'whether the statutory scheme [was] so punitive either in purpose or effect as to negate' Congress' intention to establish a civil remedial mechanism."[111] Un-

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102. *Id.* at 2143.

103. *Id.* at 2144.

104. *Id.* at 2145 (quoting Various Items of Personal Property v. United States, 282 U.S. 577, 580-81 (1931)).

105. *See supra* note 67 and accompanying text.

106. *See Ursery*, 116 S. Ct. at 2145.

107. *But see* Anielak, *supra* note 81, at 175 ("The Supreme Court continued to expand the protection under the Double Jeopardy Clause in *Austin v. United States*."); James M. Curley, Case Comment, *Expanding Double Jeopardy:* Department of Revenue v. Kurth Ranch, 75 B.U. L. REV. 505, 527 (1995) (arguing that although *Kurth Ranch* has a limited scope, it nevertheless "expanded the Double Jeopardy Clause further into the realm of civil proceedings").

108. *Ursery*, 116 S. Ct. at 2147.

109. *Id.* at 2146.

110. *Id.* at 2147.

111. United States v. One Assortment of 89 Firearms, 465 U.S. 354, 365 (1984) (quoting United States v. Ward, 448 U.S. 242, 248-49 (1980)); *see supra* note 59 and

der this traditional test, the Court concluded that "*in rem* civil forfeitures are neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause."[112]

IV. ANALYSIS

As mentioned in the introduction to this Note, the decision in *Ursery* is surprising. First, it contradicts the legal community's perception of the trend in double jeopardy analysis.[113] Additionally, both the holding and the reasoning supporting *Ursery* are seemingly inconsistent with the Court's earlier decisions in *Halper*, *Austin*, and *Kurth Ranch*. In fact, certain aspects of *Ursery* are in direct conflict with principles enunciated in those recent decisions.

Part IV.A below explores the inconsistencies between the decision in *Ursery* and those in *Halper*, *Austin*, and *Kurth Ranch*. In light of these inconsistencies, the Court's decision in *Ursery* is somewhat forced. In *Ursery*, the Court resorted to the flimsy and inadequate guilty-property fiction to reestablish the criminal/civil dichotomy in forfeiture law. Part IV.B examines the Court's use of the guilty-property fiction and explains why it is inadequate both philosophically and practically in the context of modern forfeitures. Finally, Part IV.C of this Note explores the inability of *Ursery* to protect against the dangers of modern forfeiture and to mitigate, in particular, the harshness of instrumentality forfeiture.

A. Ursery: *Contradicting* Halper, Austin, *and* Kurth Ranch

The majority in *Ursery* stated that the Sixth and Ninth Circuits simply "misread" *Halper*, *Austin*, and *Kurth Ranch*. However, Justice Stevens in his separate opinion in *Ursery* argued that it was "the majority . . . that [had] 'misread'"[114] these cases. This Note argues that Justice Stevens' view is correct.

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accompanying text.

112. *Ursery*, 116 S. Ct. at 2149.

113. The trend seemed to indicate an expansion of double jeopardy jurisprudence into the realm of civil actions. *See supra* notes 14, 87, 107 and accompanying text.

114. *Ursery*, 116 S. Ct. at 2156 (Stevens, J., concurring in the judgment in part and dissenting in part).

1. The Court's misreading of Halper

The majority's opinion in *Ursery* emphatically states that nothing in the Court's recent double jeopardy cases could be read to replace its traditional understanding of civil forfeiture.[115] However, several of the principles underlying the Court's rationale are incompatible with the Court's double jeopardy cases since *Halper*.

For example, the majority explained that the rules enunciated in *Halper* did not control in *Ursery* since *Ursery* involved civil forfeiture, rather than the kind of civil penalty provision involved in *Halper*. Notwithstanding this slight factual discrepancy, it seems incongruent that *Halper* should not influence *Ursery*.[116] *Halper* explored an issue with broad implications: whether, and under what circumstances, a civil sanction might actually constitute punishment. In *Halper*, the Court concluded by enunciating a clear statement to guide the determination of when a civil sanction becomes punishment for purposes of the Double Jeopardy Clause. It stated that any "civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment."[117] In order to arrive at this conclusion, the *Halper* Court had to "redefine[] and enlarge[] the double jeopardy clause's multiple punishment prohibition."[118] The decision represented a departure from many years of consistent double jeopardy jurisprudence.[119] It is consequently both surprising and confusing for the Court to suggest in *Ursery* that civil forfeiture should not be influenced by the Court's modern treatment of other civil sanctions.

This proposition is particularly surprising given the Court's determination in *Halper* that statutory labels were not impor-

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115. *See id.* at 2144.

116. Indeed, the factual discrepancy can apparently be explained away. A civil penalty is a monetary fine. *See id.* at 2145. Yet, the Court in *Austin* stated that traditionally a "fine" was "understood to include 'forfeiture' and vice versa." Austin v. United States, 509 U.S. 602, 614 n.7 (1993).

117. United States v. Halper, 490 U.S. 435, 448 (1989).

118. Andrew Z. Glickman, Note, *Civil Sanctions and the Double Jeopardy Clause: Applying the Multiple Punishment Doctrine to Parallel Proceedings After* United States v. Halper, 76 VA. L. REV. 1251, 1251 (1990).

119. *See* Linda S. Eads, *Separating Crime from Punishment: The Constitutional Implications of* United States v. Halper, 68 WASH. U. L.Q. 929, 929-30 (1990) (discussing "the radical points of departure" that the holding in *Halper* signalled); *see also* Glickman, *supra* note 118, at 1251.

tant in guiding double jeopardy analysis; rather, it was "the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated."[120] *Ursery* strips away the meaning of this statement since the Court specifically relied on the traditional underlying civil nature of forfeiture to immunize it from application of the Double Jeopardy Clause, seemingly reserving double jeopardy for criminal proceedings and apparently all other civil sanctions that might serve punitive purposes. The language used in articulating both the analysis[121] and statement of the holding in *Halper* contradicts such a narrow interpretation.[122] The Court's statement of the holding in *Halper* includes *all* civil sanctions:

> We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.[123]

If the Court had intended *Halper* to apply only in the case of *in personam* penalties, it would certainly have narrowed its language by using a more restrictive term rather than the broad and inclusive term "civil sanction."[124]

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120. *Halper*, 490 U.S. at 447 n.7.

121. The Court used the inclusive term "civil sanction" consistently throughout the *Halper* opinion. For example, the Court stated the question in *Halper* broadly: "[W]hether a civil sanction, in application, may be so divorced from any remedial goal that it constitutes 'punishment' for the purpose of double jeopardy analysis." *Id.* at 443. The Court explained later in the opinion that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* at 448. The Court also stated that "whether a given civil sanction constitutes punishment . . . requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve." *Id.*

122. *See* Glickman, *supra* note 118, at 1267:

> Because the Court's language in *Halper* may be read narrowly, based on the facts of the case, or expansively, based on the language used to reach its conclusion, the scope of the Court's holding is uncertain. A literal reading of the Court's theory on what constitutes punishment suggests that *any* civil sanction that is not exclusively remedial will implicate the double jeopardy clause's multiple punishment protection.

Id. (emphasis added).

123. *Halper*, 490 U.S. at 448-49.

124. The Court had previously referred to civil forfeiture as a "civil sanction." *See* United States v. One Assortment of 89 Firearms, 465 U.S. 345, 366 (1984). *But see Halper*, 490 U.S. at 449-50 ("What we announce now is a rule for the rare case, the

The Court in *Ursery* articulated a second reason why *Halper* did not apply to *Ursery*: the "practical difficulty of applying *Halper* to . . . civil forfeiture."[125] The Court explained that a civil penalty is "designed as a rough form of 'liquidated damages' for the harms suffered by the government as a result of a defendant's conduct."[126] In contrast, the Court explained that civil forfeitures are designed to do more than merely compensate the government. Rather, they are primarily designed "to confiscate property used in violation of the law [and] to require disgorgement of the fruits of illegal conduct."[127] The Court explained that because it is "virtually impossible to quantify . . . the nonpunitive purposes" served by a given civil forfeiture, the "balancing test set forth in *Halper*, in which a court must compare the harm suffered by the government against the size of the penalty imposed, is inapplicable to civil forfeiture."[128]

The argument that it is "difficult to determine whether a particular forfeiture bears [any] rational relationship to [its] nonpunitive purposes"[129] is weak as a justification for not applying *Halper* to civil forfeiture. The Court stated in *Halper* that "it would be difficult if not impossible in many cases" for a court to decide at what point "a civil sanction has accomplished its remedial purpose of making the Government whole, but beyond which the sanction takes on the quality of punishment."[130] It makes little sense that the Double Jeopardy Clause should not apply to forfeitures merely because a balancing test to ensure proportionality would be practically difficult to apply. The argument is

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case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused."). However, many have interpreted this statement to be giving simply one specific example of a possible punitive sanction, rather than the only possible punitive scenario. For example, Professor Nancy King notes that the *Halper* decision "unloosed a steady stream of double jeopardy challenges by convicted defendants facing civil forfeitures, administrative penalties, tax assessments, and other civil sanctions." King, *supra* note 1, at 123.

125. United States v. Ursery, 116 S. Ct. 2135, 2144 (1996).

126. *Id.* at 2145. *But see* Glickman, *supra* note 118, at 1278 ("While some civil penalties are related to the amount of the Government's losses or costs of investigation and prosecution, few penalty provisions are tailored so as to recover only the damages and costs incurred by tha federal Government.").

127. *Ursery*, 116 S. Ct. at 2145.

128. *Id.*

129. *Id.*

130. *Halper*, 490 U.S. at 449.

even less compelling in light of the Court's decisions in *United States v. Ward*[131] and *Austin v. United States*.[132]

While the nonpunitive purposes served by forfeiture may be generally hard to quantify,[133] the Court in *Ward* and *Austin* nevertheless explained that there is a point where gross disproportionality makes civil remedies clearly punitive. In *Ward*, the Court recognized that any sanction that bore "absolutely no correlation to any damages sustained by society or to the cost of enforcing the law" would be criminal.[134] Furthermore, in *Austin*, the Court explained that the value of certain forfeited properties "can vary so dramatically that any relationship between the Government's actual costs and the amount of the sanction is merely coincidental."[135] Even in *Halper* the Court recognized that when a "remedial sanction . . . does not remotely approximate the Government's damages and actual costs . . . rough justice becomes clear injustice."[136] It seems inconsistent that the Double Jeopardy Clause could be invoked to limit cash penalties under *Halper*, yet could not limit runaway, in-kind payments under *Ursery*.

2. *The Court's misreading of* Austin

The Court stated unequivocally in *Ursery* that it "declined to import the analysis of *Austin* into [its] double jeopardy jurisprudence"[137] on the grounds that it did not involve the Double Jeopardy Clause at all, but "was [instead] decided solely under the Excessive Fines Clause of the Eighth Amendment, a constitutional provision which [the Court] never [has] understood as parallel to, or even related to, the Double Jeopardy Clause of the

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131. 448 U.S. 242 (1980).

132. 509 U.S. 602 (1993).

133. The "nonpunitive purposes" served by civil forfeiture are generally considered to include compensation to the government for law enforcement costs and to society as a whole for any harm inflicted by the criminal act.

134. *Ward*, 448 U.S. at 254.

135. *Austin*, 509 U.S. at 622 n.14.

136. *Halper*, 490 U.S. at 446. The Court also statsd that a "defendant [should be] protected from a sanction so disproportionate to the damages caused that it constitutes a second punishment." *Id.* at 450.

137. United States v. Ursery, 116 S. Ct. 2135, 2147 (1996).

Fifth Amendment."[138] Nevertheless, there are several connections between the two constitutional provisions.

At the threshold, both amendments serve a similar purpose. The Court in *Austin* explained that the "purpose of the Eighth Amendment . . . was to limit the government's power to punish."[139] "Punishment" plays the central role in the jurisprudence of both amendments.[140] It has been argued that the constitutional limitations of the Eighth and Fifth Amendments on punishment "are inseparable" as "two forms of regulation [which] operate in tandem to regulate the totality of punishment."[141] It seems incongruous to suggest, as the *Ursery* Court does, that a particular forfeiture proceeding is punishment for purposes of the Excessive Fines Clause but is not punishment under the Double Jeopardy Clause.[142] As Justice Stevens wrote, "It is difficult to imagine why the Framers of the two amendments would have required a particular sanction not to be excessive, but would have allowed it to be imposed multiple times for the same offense."[143]

More importantly, however, the *Austin* opinion's reliance on the analysis in *Halper* suggests a connection between the two amendments.[144] The Court's holding in *Austin* depends on the

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138. *Id.* at 2146. *But see* McClain, *supra* note 6, at 944 (noting that "[a]lthough *Austin* is an Eighth Amendment case, it has double jeopardy implications" and therefore section 881 could now be limited under the Double Jeopardy Clause); Sackett, *supra* note 14, at 514 (arguing that the Court never expressly or implicitly restricted the holding of *Austin* to cases challenged under the Excessive Fines Clause).

It is interesting to note that in *Austin* the Court admitted to having had only one prior occasion to consider the Excessive Fines Clause. *See Austin*, 509 U.S. at 608. Yet, the Court was nevertheless certain that it was "a constitutional provision which [the Court] never [has] understood as parallel to, or even related to, the Double Jeopardy Clause of the Fifth Amendment." *Ursery*, 116 S. Ct. at 2146.

139. *Austin*, 509 U.S. at 609.

140. *See Ursery*, 116 S. Ct. at 2156 (Stevens, J., concurring in the judgment in part and dissenting in part).

141. King, *supra* note 1, at 104.

142. "Logic dictates that if a proceeding is punitive, it remains punitive whether challenged as excessive under the Eighth Amendment or, for example, as a violation of the Double Jeopardy Clause of the Fifth Amendment." Sackett, *supra* note 14, at 514.

143. *Ursery*, 116 S. Ct. at 2157 n.5 (Stevens, J., concurring in the judgment in part and dissenting in part).

144. *See, e.g.*, United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1219 (9th Cir. 1994), *rev'd sub nom.* United States v. Ursery, 116 S. Ct. 2135 (1996). As the Ninth Circuit held:

> [T]he only fair reading of the Court's decision in *Austin* is that it resolves the "punishment" issue with respect to forfeiture cases for purposes of the Double Jeopardy Clause as well as the Excessive Fines Clause. In short, if a

principle first established in *Halper* that permits the "notion of punishment [to] cut[] across the division between the civil and the criminal law."[145] The *Austin* Court explained that in light of *Halper*, the question before it was "not, as the United States would have it, whether forfeiture is civil or criminal, but rather whether it is punishment."[146] Without *Halper*, the analysis in *Austin* would not have proceeded past a finding that forfeiture as a traditionally civil proceeding was remedial and therefore unaffected by the Excessive Fines Clause.

Even if the *Ursery* Court was correct in "declin[ing] to import the [Excessive Fines Clause] analysis of *Austin* into [its] double jeopardy jurisprudence,"[147] it should not have ignored the statements made in *Austin* regarding double jeopardy. For example, in discussing the constitutional protections that have been applied to civil forfeiture proceedings, the *Austin* Court explained that "[t]he Double Jeopardy Clause has been held not to apply in civil forfeiture proceedings, *but only* in cases where the forfeiture could properly be characterized as remedial."[148] The Court further explained that "even those protections associated with criminal cases may apply to a civil forfeiture proceeding if it is so punitive that the proceeding must reasonably be considered criminal."[149] The Court in *Austin* clearly understood from *Halper* that a civil forfeiture could and would come under double jeopardy analysis if it were found to be punitive rather than solely reme-

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forfeiture constitutes punishment under the *Halper* criteria, it constitutes "punishment" for purposes of *both* clauses.

Id.

145. United States v. Halper, 490 U.S. 435, 448 (1989); *see also $405,089.23 U.S. Currency*, 33 F.3d at 1219 ("In *Austin*, the Court specifically applied the *Halper* test to determine whether a civil forfeiture . . . constituted 'punishment.'"); Anielak, *supra* note 81, at 175 ("The *Austin* Court explicitly reaffirmed the holding of *Halper*.").

146. United States v. Austin, 509 U.S. 602, 610 (1993).

147. *Ursery*, 116 S. Ct. at 2147.

148. *Austin*, 509 U.S. at 608 n.4 (emphasis added). Justice Stevens, writing in *Ursery*, read this statement in *Austin* to have "rejected the monolithic view that all *in rem* civil forfeitures should be treated the same and recognized the possibility that other types of forfeitures that could not 'properly be characterized as remedial' might constitute 'an additional penalty for the commission of a criminal act.'" *Ursery*, 116 S. Ct. at 2154 (Stevens, J., concurring in the judgment in part and dissenting in part) (quoting United States v. One Assortment of 89 Firearms, 465 U.S. 354, 366 (1984)); *see also* Cheh, *Can Something This Easy, supra* note 2, at 13-14 (explaining that "[t]he Court [in *Austin*] clearly signalled that, where forfeitures operate as punishment, the Double Jeopardy Clause will apply").

149. *Austin*, 509 U.S. at 608 n.4.

dial. Surprisingly, the Court refused to extend this principle from *Halper* and *Austin* to the civil forfeiture in *Ursery*.

3. *The Court's misreading of* Kurth Ranch

The *Ursery* opinion briefly dismissed *Kurth Ranch* as having no influence on the Court's traditional understanding of civil forfeiture. However, *Kurth Ranch* contributed significantly to double jeopardy jurisprudence by further breaking down the criminal/civil dichotomy in the context of "punishment." The Court stated in *Kurth Ranch* that "the legislature's description of a statute as civil does not foreclose the possibility that it has a punitive character."[150] Yet, only two years later the Court's analysis in *Ursery* specifically depended upon the strict division between the civil and criminal law.[151]

The *Ursery* Court viewed *Kurth Ranch* as supporting the proposition that *Halper's* "case-specific approach was impossible to apply outside the context of a fixed civil-penalty provision."[152] Yet, whether or not the *Halper* approach was employed in *Kurth Ranch*, it stood independently as an additional example of the kind of evaluation required to determine when nominally civil sanctions in fact constitute punishment. *Kurth Ranch* represented an expansion of double jeopardy analysis to include not only civil penalties, but also civil drug tax statutes. If anything, the suggestion of *Kurth Ranch* was that double jeopardy jurisprudence could and should be expanded further.[153]

B. *Reexamining the "Guilty Property" Fiction*

There is one further inconsistency between the *Austin* and *Ursery* decisions. It involves the historical fiction that the inanimate object being forfeited is itself guilty and is therefore subject

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150. Department of Revenue v. Kurth Ranch, 511 U.S. 767, 777 (1994); *see also* Cheh, *Can Something This Easy*, *supra* note 2, at 12 (arguing that after *Halper*, *Austin*, and *Kurth Ranch*, "the criminal/civil distinction is not as constitutionally significant as some have supposed" since "the Supreme Court looks past the label and asks whether the purposes of the particular constitutional safeguard are served by applying it in a civil case").

151. *See infra* Part IV.B.

152. *Ursery*, 116 S. Ct. at 2146.

153. *See, e.g.*, Anielak, *supra* note 81, at 183-84 (explaining that an "important ramification of the majority's opinion in *Kurth* is the Court's continued willingness to look beyond legislative labels when determining whether a civil action is punitive [which] may have applicability to other situations").

to punishment.[154] The *Ursery* Court contradicted its decision in *Austin* by reviving this legal fiction, which it had clearly discredited only a few years before.[155]

The majority's holding in *Ursery*—that *in rem* civil forfeiture is not criminal for purposes of the Double Jeopardy Clause—rests in part on the "historical distinction that [the Court] has drawn between civil forfeiture and civil penalties."[156] The Court relied on the historical understanding that in the event of a civil penalty, "'it is the wrongdoer in person who is proceeded against . . . and punished,' [whereas] in an *in rem* forfeiture proceeding, 'it is the property which is proceeded against, and by resort to a legal fiction, held guilty and condemned.'"[157]

Notwithstanding the *Ursery* Court's reliance on the traditional distinction between civil penalties and civil forfeiture, only three years earlier in *Austin* the Court had demonstrated its disapproval of a reliance on the technicalities of the *in rem* and *in personam* distinction. It stated that any "reliance" by the government "on the technical distinction between proceedings *in rem* and proceedings *in personam*" would have been "misplaced,"[158] since "'[t]he fictions of *in rem* forfeiture were developed primarily to expand the reach of the courts' which . . . might have

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154. For a discussion of the historical development of civil forfeitures, see *supra* note 16.

155. *See, e.g.*, Cheh, *Can Something This Easy*, *supra* note 2, at 7-8 (noting that "[r]ecently . . . the Supreme Court has begun to strip away the fictions associated with forfeitures" and characterizing the *Austin* decision in particular as "representing a fundamental shift in thinking about forfeiture"); Sackett, *supra* note 14, at 521 ("With its decision in *Austin*, the United States Supreme Court has explicitly recognized that *in rem* forfeiture punishes property owners for their culpable acts or omissions. It is difficult to reconcile the *Austin* holding with the continued use of the guilty property fiction."); *see also Ursery*, 116 S. Ct. at 1251 (Kennedy, J., concurring) (explaining that the majority's attempt to distinguish "between *in rem* and *in personam* punishments does not . . . revive[] the fiction alive in *Various Items*, but condemned in *Austin*, that the property is punished as if it were a sentient being capable of moral choice." (citation omitted)).

156. *Ursery*, 116 S. Ct. at 2144. The Court explained that "[s]ince at least *Various Items*, we have distinguished civil penalties such as fines from civil forfeiture proceedings that are *in rem*." *Id.*

157. *Id.* at 2145 (omission in original) (quoting Various Items of Personal Property v. United States, 282 U.S. 577, 580-81 (1931)).

158. Austin v. United States, 509 U.S. 602, 615 n.9 (1993). Justice Stevens, writing in *Ursery*, also disagreed with the emphasis the Government had placed in *Austin* on the guilty-property fiction, which tactic Stevens referred to as a "sleight-of-hand." He wrote that, notwithstanding the government's reliance on it, the *Austin* Court "did not allow [the fiction] to stand in the way of [the Court's] holding that the seizure of property may punish the owner." *Ursery*, 116 S. Ct. at 2160 (Stevens, J., concurring in the judgment in part and dissenting in part).

lacked *in personam* jurisdiction over the owner of the property."[159]

Thus, contrary to the majority's position in *Ursery*, the Supreme Court indicated in *Austin* that reliance on the guilty-property fiction would be inappropriate since it has no intrinsic merit, but was developed as a pretense to enable courts to reach property owners where jurisdiction was lacking. Justice Stevens observed that "[t]he pedantic distinction between *in rem* and *in personam* actions is ultimately only a cover for the real basis for the Court's decision [in *Ursery*]: the idea that the property . . . is being 'punished' for offenses of which it is 'guilty.'"[160]

Furthermore, in *Austin*, the Court reviewed §§ 881(a)(4) and (a)(7), the two forfeiture statutes which were at issue. Both statutes allowed for an "innocent owner" defense. Section 881(a)(7), which is also one of the provisions involved in *Ursery*, reads that "no [property] shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, or consent, or willful blindness of the owner."[161] The *Austin* Court determined that "[t]hese exemptions serve to focus the provisions on the culpability of the owner in a way that makes them look more like punishment, not less."[162] In so saying, the Court admitted that it is not the property that is held guilty and punished, but ultimately the owner.[163] Yet, although the Court in *Austin* focused on the culpability of the owner and discredited the guilty-property fiction, the Court's opinion in *Ursery* appears to reinforce the antiquated legal fiction. However, this fiction is no longer viable as a justification for powerful and broadly sweeping modern forfeiture laws.

Justice Thomas has expressed concern about the "immense scope" of § 881. He states that he is "disturbed by the breadth of new civil forfeiture statutes such as 21 U.S.C. § 881(a)(7), which

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159. *Austin*, 509 U.S. at 615-16 n.9 (quoting Republic Nat. Bank v. United States, 506 U.S. 80, 87 (1992)).

160. *Ursery*, 116 S. Ct. at 2160 (Stevens, J., concurring in the judgment in part and dissenting in part).

161. 21 U.S.C. § 881(a)(7), *quoted in Austin*, 509 U.S. at 619.

162. *Austin*, 509 U.S. at 619.

163. In *Austin*, the Court explained its understanding that the guilty-property fiction is "premised on the idea that the owner has been negligent." *Id.* at 618; *see also* Sackett, *supra* note 14, at 520 ("*Austin* implicitly recognizes that, although civil forfeiture proceedings are technically proceedings in rem, property owners must have acted in some culpable manner to come within the scope of the statute.").

subjects to forfeiture *all* real property that is used, or intended to be used, in the commission, or even the *facilitation*, of a federal drug offense."[164] Justice Thomas has expressed concern that because "§ 881(a)(7) is so broad, [it] differs not only in degree, but in kind, from its historical antecedents."[165] Consequently, he questions whether the guilty-property fiction, "the central theory behind *in rem* forfeiture," is able to "fully justify" the great scope of § 881(a)(7).[166]

Indeed, it is no longer reasonable to use this legal fiction in the context of modern forfeiture. Resting modern law enforcement objectives on the unsound and ancient fiction that property being forfeited must be punished for its guilt has provided grounds for extremely powerful and broadly sweeping forfeiture laws.[167] The fiction that the property is guilty, coupled with the related idea that an owner must control his property, allows harsh and unjust results to occur in the context of instrumentality forfeiture. Focusing the proceeding on the property itself allows for individuals to lose their "guilty" property although they may have had no direct involvement in the crime upon which the forfeiture action was predicated.[168] For example, parents have had their cars or homes forfeited to the government for crimes committed by their children; wives and children have lost their homes due to drug-dealing husbands; property owners have lost their boats or homes due to the activities of their guests.[169] In

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164. United States v. James Daniel Good Real Property, 510 U.S. 43, 81 (1993) (Thomas, J., concurring in part and dissenting in part).

165. *Id.* at 82.

166. *Id.*

167. *See* Cheh, *Can Something This Easy*, *supra* note 2, at 7 ("When laudable and sensible modern goals were simply hitched to these ancient, sometimes irrational, and often high-handed practices, abuse was inevitable.").

168. *See* Shannon T. Noya, Comment, *Hoisted by Their Own Petard: Adverse Inferences in Civil Forfeiture*, 86 J. CRIM. L. 493, 496 (1996) ("Since the owner's guilt or innocence is not at issue, sometimes a guiltless owner will lose her property.").

169. *See generally* Bennis v. Michigan, 116 S. Ct. 994, 999 (1996) (upholding the forfeiture of a car owned jointly by a married couple which was used by the husband in his illegal activity with a prostitute); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 665 (1974) (upholding the forfeiture of a yacht leased to two Puerto Rican residents who brought a marijuana cigarette on board although the owner had no prior knowledge that the yacht would be wrongfully used); United States v. 19 & 25 Castle Street, 31 F.3d 35 (2d Cir. 1994) (upholding the forfeiture of the family home of Jose and Virginia Gonzalez as a result of their adult children's possession of narcotics on the premises); United States v. Sixty Acres, 930 F.2d 857 (11th Cir. 1991) (upholding the forfeiture of an Alabama farm and residence to which the wife held title despite her testimony that she was a battered woman and feared reporting her husband's illegal drug activity); United States v. 77 Walnut St., No. 90-1729, 1990 U.S.

the circumstance of an owner who was uninvolved and unaware of the wrongful activity, "it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive."[170] As a result, use of the guilty-property fiction as a justification for these forfeitures must be thoroughly reviewed.[171] Indeed, one author has argued that "[u]nlike confiscation of harmful objects or crime proceeds, there is no justification for the forfeiture of all property that facilitates a crime in any manner."[172]

C. Ursery's *Failure to Address the Controversial Aspects of Modern Civil Forfeiture*

In deciding *Ursery* as it did, the Court missed an opportunity to remedy some of the more controversial aspects of modern civil forfeiture. For instance, *Ursery*'s continued reliance on the guilty-property fiction hinders the courts' ability "to extend needed constitutional protections to [defendants] in civil forfeiture proceedings."[173] Moreover, such protections are increasingly needed to guard against the harsh realities of modern instrumentality forfeiture statutes.

One such harsh reality is the potential of these civil statutes to serve punitive ends. Although "[s]trictly limited seizures of contraband and proceeds are, by definition, remedial,"[174] seizures of instrumentalities can be either remedial or punitive. The Supreme Court in *Austin* clearly understood the potential for civil forfeitures to punish. In that case, the Court rejected the government's arguments that (1) forfeitures under §§ 881(a)(4) and (a)(7) are remedial "because they remove the 'instruments' of the

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App. LEXIS 22457, at *7 (1st Cir. Dec. 10, 1990) (affirming the seizure of a family home because it had been used by the husband to facilitate his illegal drug activity); United States v. 4.14 Acres, 801 F. Supp. 737, 742-43 (S.D. Ga. 1992) (approving the forfeiture of a home belonging to a single mother with a fifth-grade education because she did not report or evict her drug-using daughters); United States v. 1978 Chrysler Le Baron Station Wagon, 648 F. Supp. 1048, 1051 (E.D.N.Y. 1986) (affirming the forfeiture of a father's car as a result of its unauthorized use by the son who used it to transport drugs).

170. *Calero-Toledo*, 416 U.S. at 689-90.

171. "A fresh look at the reality of forfeiture and judging it by a contemporary understanding of constitutional law . . . underlies the requiem for the fiction of 'guilty property' in *Austin*." Cheh, *Can Something This Easy*, *supra* note 2, at 31-32. As Justice Holmes stated, "It is revolting to have no better reason for a rule of law than that . . . it was laid down in the time of Henry IV." O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

172. Pollock, *supra* note 28, at 479.

173. Sackett, *supra* note 14, at 522.

174. Cheh, *Can Something This Easy*, *supra* note 2, at 23.

drug trade,"[175] thus protecting the community; and (2) because the forfeited assets serve to compensate the government for its law enforcement activity.[176] The Court explained that "neither argument withstands scrutiny."[177]

Because defendants in civil forfeiture cases do not enjoy the constitutional protections available to them in criminal cases and because many civil forfeitures involving instrumentalities are punitive, the Double Jeopardy Clause should apply to the civil forfeiture of instrumentalities.[178] When instrumentality forfeiture is clearly punitive, the double jeopardy prohibition against a second punishment must be available to owners.

Another aspect of current forfeiture laws that causes concern is that they make abuse inevitable. In fact, former New York City Police Commissioner Patrick Murphy reported to Congress that "'[t]he large monetary value of forfeitures . . . has created a great temptation for state and local police departments to target assets rather than criminal activity.'"[179] Cheh refers to the "growing evidence that the ease and profitability of forfeiture have refocused law enforcement away from apprehension and investigation of criminals to grabbing property."[180] For instance, she writes:

> Police actively have set out to create criminal opportunities in order to forfeit property, and they have pursued weak and questionable cases. For example, police departments have set up sting operations in which they sell drugs to passers-by in automobiles and then seize the cars. No criminal charges are brought; the objective is to obtain the property. Police have targeted individuals with expensive homes and used flimsy bases to conduct searches, hoping to find drugs. Using drug courier profiles, police stop people in cars or airports or bus stations. If the person has a large amount of cash, the police seize it as "drug proceeds" and leave it to the owner to try to get it back.[181]

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175. Austin v. United States, 509 U.S. 602, 620 (1993).

176. "[C]ivil asset forfeitures never were intended to serve as a form of restitution nor are they designed to serve that goal." Cheh, *Can Something This Easy*, *supra* note 2, at 18.

177. *Austin*, 509 U.S. at 621.

178. "Forfeiture, no matter if historically rubberstamped by courts, should be seen for what it is and judged under modern conceptions of due process." Cheh, *Can Something This Easy*, *supra* note 2, at 31.

179. Miniter, *supra* note 35, at 34 (alteration in original).

180. Cheh, *Can Something This Easy*, *supra* note 2, at 43.

181. *Id.* at 44 (footnotes omitted).

Thus, in many instances, law enforcement officials are merely imposing a nonstatutory tax on the drug trade through instrument forfeiture rather than placing participants behind bars. The *Ursery* decision does nothing to advance reform in this area.

Modern forfeiture law with its ability to reach any remotely facilitating property must be critically reviewed. Over the past twenty years, Congress has expanded civil forfeiture significantly "without expanding any statutory protections to the property owner."[182] As a result, the laws are unduly harsh and oppressive, yet are being used aggressively and frequently by law enforcement agencies. By declining to subject civil forfeitures to double jeopardy analysis, the Court in *Ursery* missed an opportunity to "corral" these "runaway forfeitures."[183]

V. CONCLUSION

The Court was seemingly disingenuous in *Ursery* when it stated that the lower courts had simply misread its earlier trio of double jeopardy cases. The analysis and holdings of these earlier decisions, although somewhat ambiguous in the scope of their application, clearly sought to extend constitutional protections to those civil sanctions which served punitive, rather than solely remedial purposes. In *Halper* and *Kurth Ranch*, the Court brought both civil penalties and civil drug tax statutes under double jeopardy review because of their potential to constitute punishment. It is surprising, therefore, that the Court declined to bring civil forfeiture under the review of the Double Jeopardy Clause, particularly because of the Court's determination in *Austin* that civil asset forfeiture punishes the owner and in light of the fact that civil asset forfeiture has the potential to be even more harsh than either a civil penalty or drug tax statute. The lower courts did not misread or misinterpret the recent precedent, but rather, the Supreme Court saw in *Ursery* a chance to scale back the great departure from the criminal-civil dichotomy that the earlier cases had signalled. Somewhere between the unanimous decision of *Halper* and the recent decision in *Ursery*, the Court decided "it [was] time to put the *Halper* genie back in the bottle."[184] In light of the many controversial aspects of instru-

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182. Pollock, *supra* note 28, at 470.

183. Cheh, *Can Something This Easy*, *supra* note 2, at 8.

184. Department of Revenue v. Kurth Ranch, 511 U.S. 767, 804 (1994) (Scalia, J., dissenting).

mentality forfeiture, the Supreme Court's decision in *Ursery* is disappointing. The Court missed an opportunity not only to address some of the concerns that have been raised in connection with this form of forfeiture, but, more importantly, to remedy the harsh realities of modern instrumentality forfeiture. Instead, *Ursery* sends a green light to prosecutors and law enforcement agencies to continue their aggressive pursuit of civil asset forfeiture. Although under *Austin*, civil forfeiture must still satisfy an excessiveness review, prosecutors and law enforcement agencies have in no way been limited in pursuing both a criminal action and a civil forfeiture proceeding which will undoubtedly and frequently result in punishing the defendant twice.

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